

No. 12,477

IN THE

United States Court of Appeals
For the Ninth Circuit

MARY ZELLMER, as Administratrix of
the Estate of Orval Zellmer, and
MARY ZELLMER, an Individual,

Appellant,

VS.

ACME BREWING Co. (a corporation),

Appellee.

BRIEF FOR APPELLEE.

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Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The complaint in this case seeks a recovery for the alleged wrongful death of Orval Zellmer, and for personal injuries to Mary Zellmer all occurring in Nevada, and allegedly resulting from the negligent manufacturing or packaging of beer by defendant. The complaint shows on its face that both of these claims are barred if the California one year statute of limitations (C.C.P., § 340) is applicable. The District Court concluded that the California statute of limitations applied and dismissed the complaint.

This appeal presents clear and rather simple issues. There are, to begin with, a number of relevant rules of law which cannot be challenged. We are confident that appellant will not dispute the following:

1. This Honorable Court must apply and follow the California rules of conflict of laws.

Griffin v. McCoach, 313 U.S. 498, 61 S. Ct. 1023, 85 L. ed. 1481.

2. In all cases of conflict of laws, the *lex loci* governs only matters of substance, and all matters of procedure are governed by the law of the forum.

3. It is a universally accepted general rule that statutes of limitation are *procedural*, and that the limitation period of the law of the forum (California, in this case) is applicable. If the action is barred by the *lex fori*, it may not there be prosecuted even though the limitations period of the *lex loci* may not have run.

Beale, Conflict of Laws, page 1620;

Ceccich v. Giardino, 37 C.A. (2d) 394 (99 P. (2d) 573).

We come now to the fourth rule; the application and extent of which is the basic issue on this appeal.

4. Where an action is created by statute (e.g., one for wrongful death) and, as a part thereof, the right so created is conditioned by a time limitation, such time limitation¹ is substantive and bars the right itself,

¹A time limitation of this kind is not a "statute of limitations" at all. *Adams v. Albany* (D.C., Cal., 1948), 80 F. S. 876. It is be-

rather than merely the remedy, with the result that when such time has elapsed, the *cause of action* is *extinguished*, and cannot (as can actions subject to procedural time limitations) be sued upon in other jurisdictions having longer procedural statutes of limitations.

Davis v. Mills, 194 U.S. 451, 24 S.Ct. 692, 48 L. ed. 1067.

In her first point on appeal, appellant attempts to extend the fourth rule above mentioned as follows: Appellant argues that such a substantive time limitation *must* govern the laws of *any* jurisdiction, and has the extraterritorial effect of compelling foreign Courts to entertain actions which, under the *procedural* laws of those jurisdictions would otherwise be barred. With this, we disagree. In answering appellant's first point, however, we will first assume that this extreme theory is correct, and show that appellant nevertheless cannot recover because the Nevada time limitation is *not* substantive; it is a typical, procedural statute of limitations. (Even appellant admits that if this is so, her action was properly dismissed.) We will then go further, however, and show as a second, independent answer that there can be no such legal doctrine as appellant relies on, and that, therefore, she cannot recover whether the Nevada limita-

cause it is sometimes considered as such that confusion has arisen in some of the cases pertinent to this point. The two time elements relate to separate and different phases of conflict of laws: one, whether a cause of action exists (which is purely substantive), and two, whether such action, *if* it exists, may be prosecuted, as a procedural matter, in the court of the forum.

tion is procedural *or* substantive; that in either event the California statute of limitations must be applied.

Appellant's second point is that her action for her own personal injuries should not have been dismissed. Admittedly, California law governs here, and one of the sections of the California statute of limitations is to be applied. Appellant claims that she is suing for breach of warranty and that, therefore, the two year time limitation (C.C.P., § 339) applies rather than the one year limitation of C.C.P. § 340. We will show that this argument has been resolved many times, in California and elsewhere, adversely to appellant.

APPELLEE'S CONTENTIONS.

Appellee contends that:

1. The action for wrongful death was properly dismissed because:

(a) The Nevada time limitation applicable to wrongful death is a purely procedural statute of limitations; and, therefore, even if the rule stated by appellant were correct, she cannot recover; and

(b) Independently of the above, the California statute of limitations must be applied whether the Nevada time limitation is substantive or procedural.

2. An action for personal injuries, even though couched in terms of breach of warranty, is barred by the one year statute of limitations.

THE ACTION FOR WRONGFUL DEATH WAS
PROPERLY DISMISSED.

A. The Nevada time limitation for wrongful death is a purely procedural statute of limitations.

Appellant says that there is case law establishing the following rule: Where a wrongful death statute contains a substantive limitation on the right to sue (as distinguished from the usual procedural limitation which goes only to the remedy) that limitation operates in all jurisdictions not only to *extinguish* the right by passage of time, but it has also the extraterritorial effect of superseding the procedural remedial statutes of limitations of the *lex fori*, and compels the Courts of all other states to entertain the action at any time within the time limitation of the *lex loci*.

We will show later that there is no rule of law having the effect claimed by appellant. However, for the purpose of the point here being discussed we will *assume* the stated rule to be correct, and show that nevertheless appellant cannot recover.

If the above rule is correct, appellant, to take advantage of it, must demonstrate that the Nevada time limitation on actions for wrongful death is a substantive *condition of the right*, and not an ordinary procedural statute of limitations. If it is the latter, appellant must concede that the action was properly dismissed.

The difference between a statute which contains a substantive time limitation, and a statute which is subject to an ordinary, procedural statute of limitations, is exemplified in *Gregory v. Southern Pacific*

Co. (C.C., Ore., 1907), 157 Fed. 113. The Court there considered the construction of a number of wrongful death statutes with respect to the point here involved. It was specifically concerned with the California statute. It held that where such a statute itself contains a proviso (as did the original California death statute), the proviso is a part, and a limitation of the right; but where the death statute is silent as to the time of bringing the action, and the only limitation is found in the general limitations statute, the time element is procedural only. The Court said (pp. 118-119):

“Now, to apply the doctrine as thus illustrated and firmly established to the case in hand, it is clear from the statute of California, first enacted with the limitation of the time for commencement of the action subjoined as a proviso, that the limitation constituted a condition attending the bringing of the action, and was designed as a part and parcel of the liability created, and could not have been considered apart from the act giving the right of action as a limitation statute simply. But must not a different intendment be ascribed to the statute in its present form? Section 377 standing alone, as it does, gives the right of action merely, without qualification or limitation.

“It is contained in title 3, while the regulation of the time for the commencement of actions in general is contained in the preceding title.

* * * * *

“Thus it will appear that the statute of limitations is completely segregated from the statute giving the right of action. Furthermore, the limitation was formerly from the time of the death

of the party injured, while now it begins to run from the time the cause of action accrued; showing that, by a rearrangement of the statutes, and their adoption in that form, a different purpose was to be subserved, and we must ascribe to such statutes, therefore, another and different intendment. That intendment, manifestly, is to place the right of action accorded by section 377 in the category of other causes, and to apply the statute of limitations to that action in manner and substance as applied to all other civil actions, treating it as a part of the remedy only, and not as a condition to the cause."

See, also:

Anderson v. Linton (7th Cir., 1949), 178 F. (2d) 304;

Hughes v. Lucker (3rd Cir., 1949), 174 F. (2d) 285;

Keys v. Pullman Co. (D.C., Tex., 1949), 87 F. Supp. 763;

8 *Cal. Jur.* 1041-1042.

Under these authorities, the Nevada wrongful death statute is clearly procedural. The statute is, along with most other Nevada causes of action, a part of the Nevada "Civil Practice Act". There are three Nevada laws governing death actions. The first is contained in Chapter 6, § 55, of the Act, entitled "PARTIES", and provides (Nevada Compiled Laws, § 8554):

"When the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs, or his personal representatives for the benefit of his heirs, may maintain an action for

damages against the person causing the death, or, if such person be employed by another person who is responsible for his conduct, then also against such other person. If such adult person have a guardian at the time of his death, only one action can be maintained for the injury to or death of such person, and such action may be brought by either the personal representatives of such adult person deceased for the benefit of his heirs, or by such guardian for the benefit of his heirs as provided in section 54. In every action under this and the preceding section such damages, pecuniary and exemplary, may be given as under all the circumstances of the case may be just. As amended, Stat. 1939, 17."

The second and third are contained in Chapter 68 of the Act, entitled "Death By Wrongful Act, Action For", §§ 705, 706, and provide (Nevada Compiled Laws, §§ 9194 and 9195):

"9194. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof then, and in every such case, the persons who, or the corporation which would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured; and although the death shall have been caused under such circumstances as amount to a felony."

"9195. The proceeds of any judgment obtained in any action brought under the provisions of this chapter shall not be liable for any debt

of the deceased; provided, he or she shall have left a husband, wife, child, father, mother, brother, sister, or child or children of a deceased child; but shall be distributed as follows:

“If there be a surviving husband or wife, and no child, then to such husband or wife; if there be a surviving husband or wife, and a child or children, or grandchildren, then, equally to each, the grandchild or children taking by right of representation; if there be no husband or wife, but a child or children or grandchild or children, then to such child or children and grandchild or children by right of representation; if there be no child or grandchild, then to a surviving father or mother; if there be no father or mother, then to a surviving brother or sister, or brothers or sisters, if there be any; if there be none of the kindred hereinbefore named, the proceeds of such judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons; provided, every such action shall be brought by and in the name of the personal representative or representatives of such deceased person; and provided further, the court or jury, as the case may be, in every such action may give such damages, pecuniary and exemplary, as shall be deemed fair and just, and in so doing may take into consideration the pecuniary injury resulting from such death to the kindred as herein named. As amended, Stats. 1939, 17.”

None of these statutes *condition* the right therein granted by any substantive time limitation. As is the case in California (see C.C.P. § 377), the right is

simply granted without qualification, substantive or otherwise, as to time.

The general provisions of Nevada law governing commencement of all civil actions is contained in Chapters 1, 2, 3 and 4 of the Practice Act. Chapter 4 is entitled "Limitations other than Real Property", and Section 25 provides (Nevada Compiled Laws, sec. 8524) :

"Section 25. Actions other than those for the recovery of real property, can only be commenced as follows:

"*Within six years:* * * *

"*Within four years:* * * *

"*Within three years:* * * *

"*Within two years:* 1. An action against a sheriff, coroner, or constable, upon the liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution.

2. An action upon a statute for a penalty or forfeiture, where the action is given to an individual, or to the state, or an individual and the state, except when the state imposing it prescribes a different limitation.

3. An action for libel, slander, assault, battery, false imprisonment or seduction.

4. An action against a sheriff, or other officer, for the escape of a prisoner arrested or imprisoned on civil process.

5. *An action to recover damages for the death of one caused by the wrongful action or neglect of another.*

“*Within one year: * * **” (Emphasis supplied.)

It is clear that the time element applicable in Nevada to the Nevada wrongful death actions is nothing more or less than a procedural statute of limitations. There is no basis whatever upon which it can reasonably be said to differ from the other limitations periods among which it is placed, and no basis upon which it can be said to qualify the *right* as distinguished from the remedy for wrongful death.

The Nevada statutes are practically identical with the California statutes on the same point. The California wrongful death statute, it has been established, contains no substantive time limitation. It is subject to an ordinary, procedural statute of limitations.

Gregory v. Southern Pacific Co., supra.

Appellant urges that “A consideration of the history of the Nevada limitation upon wrongful death actions shows that *this limitation and the cause of action for wrongful death created by Nevada law are part of the same statute.*”^{1a} This argument alone demonstrates the weakness of appellant’s position. The “same statute” referred to is the Nevada “Civil Practice Act”. This Act is actually a combined Civil Code and Code of Civil Procedure. It contains not only the wrongful death statute of limitations, but *all* limitations provision, of Nevada Civil Law; it contains not

^{1a}Appellant’s Op. Br., p. 12.

only the law governing wrongful death, but the law of negligence, libel, slander, etc., as well. It even contains the Nevada statutes establishing and regulating the State Justices' Courts.

If appellant's argument were at all sound, it would necessarily follow that *all* of the limitations periods of the Act were substantive, since they are in the "same Act" as the actions to which they refer.

The same argument was before the Court in *Gregory v. Southern Pacific Co.*, supra, for in California, both the wrongful death statute and the one year statute of limitations are contained in the Code of Civil Procedure, which, of course, is "one act".²

It is probably a fact that most wrongful death statutes do contain within themselves, substantive time limitations. See, for example, the statutes discussed in *Gregory v. Southern Pacific Co.*, supra, and those involved in the cases cited in appellant's brief.

California and Nevada, however, have chosen *not* to so limit the right which they have granted.

Appellant seeks in her brief to convey the impression that statutes which have substantive time limitations are more liberal, equitable or just than those which are subject to procedural statutes of limitations. Exactly the contrary is true.

²The California "Act" is entitled: "An Act to establish a Code of Civil Procedure", approved March 11, 1872, and section 1 of the C.C.P. states: "This Act shall be known as The Code of Civil Procedure of California * * *."

A substantive time limitation *destroys without qualification* the cause of action itself not only in the *lex loci*, but in all other jurisdictions. Where, on the other hand, the limitation is procedural, the running of time does *not* extinguish the right, but merely bars the remedy. Therefore, suit can be brought upon the cause of action which, of course, continues to exist, in any jurisdiction, the statute of which has not run, even though the remedy is barred in the *lex loci*.

Keys v. Pullman Co. (D.C. Tex., 1949), 87 F. Supp. 763.

Further, if the limitation is substantive it cannot be waived; nor can it be tolled by fraud, concealment, absence from the state, insanity, or for any other reason. If substantive, the mere passage of time irrevocably and completely destroys the cause of action.

Midstate Horticultural Co. v. Penna. Ry. Co.,
321 U.S. 356, 64 S. Ct. 128, 88 L. ed. 96;

Ewing v. Risher (10 Cir., 1949), 176 F. (2d)
641;

Adams v. Albany (D.C., Cal., 1948), 80 F.
Supp. 876;

Partee v. St. Louis & S.F. Ry. (8th Cir., 1913),
204 Fed. 970;

Mullins v. DeSoto Securities Co. (D.C., La.,
1944), 56 F. Supp. 907 (Aff'd, 149 F. (2d)
864);

Wilson v. Missouri Pac. Ry. Co. (D.C., Ark.,
1945), 58 F. Supp. 844.

See many other cases in 132 A.L.R. 292.

It is clear that a substantive time limitation on the right (rather than on the remedy) is a very real, and normally harsh limitation. The more liberal statutes do not so limit the cause of action so created.

Finally, it is established that this Honorable Court must apply to this case the same rule of conflict of laws which a California Court would apply.

Kaxon Co. v. Stentor Electric Mfg. Co., 313

U.S. 487, 61 S. Ct. 1020, 85 L. ed. 1477;

Keys v. Pullman Co. (D.C., Tex., 1949), 87

F. Supp. 763;

Griffin v. McCoach, 313 U.S. 498, 61 S. Ct. 1023,

85 L. ed. 1481.

Since the California statute is procedural, and since the Nevada statute is practically identical to it, it seems self-evident that California would hold that the Nevada time limitation is procedural, not substantive. Such a holding, even under the theory of law argued by appellant, disposes of this appeal.

In any event, however, in the case of *Engel v. Davenport*, 194 Cal. 344 (228 P. 710), the California Supreme Court adopted a rule of conflict of laws which is conclusive of the issues on this appeal. In that case the Court followed what we will later show to be the proper rule, and held that the California statute of limitations is applicable to *all* suits brought within its jurisdiction, whether or not such suits were created by foreign statutes, and whether or not such foreign statutes contained substantive time limitations. The case involved an action under the United States

Merchant Marine Act, which contained a substantive two year time limitation. The Court applied the California one year statute, saying (pp. 351-352):

“It is true that there is an exception to the general rule that the law of the forum controls to the effect that when a statute which creates a new liability limits the time within which the right may be enforced, an action seeking to enforce such right can be maintained only within the time limited by the statute creating the right, regardless of the jurisdiction in which the action was instituted. (*Davis v. Mills*, 194 U.S. 451, 454 (48 L. Ed. 1067, 24 Sup. Ct. Rep. 692); *The Harrisburg*, 119 U.S. 199, 214 (30 L. Ed. 358, 7 Sup. Ct. Rep. 140, see, also, Rose’s U. S. Notes); *Vaught v. Virginia & Southwestern R. R.*, 132 Tenn. 679 (179 S.W. 314).) Such exception to the general rule is not, in our opinion, applicable to the instant case.

“The exception to the general rule that the law of the forum governs is based upon the reasoning that when the liability and the remedy are created by the same statute, time is made of the essence of the right, and when the time prescribed by the statute has expired, the cause of action itself is extinguished. The lapse of time prescribed by the statute creating the new right having operated to extinguish the right, no right remains thereafter to support the action and consequently no action can be thereafter maintained in *any* jurisdiction. Obviously this reasoning applies only when the period prescribed by the statute creating the liability is *shorter* than the period provided by the law of the forum. There is no logical reason why the doctrine that the

limitation prescribed by the statute of another jurisdiction, which creates a right of action, is a condition of the right of action so that the latter is extinguished when the time so prescribed has expired, and will not thereafter sustain an action anywhere should exclude the operation of the general rule which refers the question of limitation to the law of the forum, if the period prescribed by the statute of the other jurisdiction creating the liability has not expired. (46 L.R.A. (N.S.) 687.) The exception to the general rule being based upon the theory of the extinguishment of a right by the lapse of time, if the time prescribed by the statute creating the right is *longer* than the time provided by the law of the forum, such actions will not fall within the exception but will be governed by the general rule that the law of the forum—in the instant case, the state statute of limitations—will prevail. (*Weaver v. Baltimore & O. R. Co.*, 21 D.C. (10 Mackey) 499; *Hutchings v. Lamson*, 96 Fed. 720 (37 C.C.A. 564); 2 Wharton on Conflict of Laws, 3d ed., sec. 540b, pp. 1264, 1265.)” (Emphasis supplied.)

This case establishes the California law, and is a conclusive answer to appellant’s contention.³

With one exception, all of the decisions relied upon and cited by appellant involve statutes where the time

³The result of this case was reversed in 271 U.S. 33, 70 L. ed. 813, on the ground that this was not a case involving conflict of laws. Since the act involved was a federal law, it could not conflict with state law because acts of Congress are the supreme law of the land, and the provisions of federal law stated by Congress “in the exercise of its *paramount authority*” must control. The case does, of course, state the California rule applicable to conflicting *state* laws, over which rule the U.S. Supreme Court has no authority.

limitation is clearly a substantive limitation on the right, and, therefore, are not in point. The one exception is the case of *Maki v. George R. Cooke Co.* (6 Cir., 1942), 124 F. (2d) 663, decided on the same day, and by the same Court that decided *Wilson v. Massengill* (6 Cir., 1942), 124 F. (2d) 666.

That Court held what appeared to be a procedural statute, to be substantive. We believe that the Court's error was based upon its failure to realize that the distinction is more than a mere isolated technicality. As we have shown above, serious, restrictive consequences flow from a holding that a time limitation is substantive. The Court in the *Maki* case failed to perceive this, and thought that the distinction involved "whittling with a dull blade upon illogical niceties" The decision does not, however, coincide with the law of California, which is clearly laid down in *Engel v. Davenport*, *supra*.

There are two cases cited by appellant which deserve some comment. They are *Calvin v. Western Coast Power Co.* (D.C., Ore., 1942), 44 F. Supp. 783, and *Lewis v. R.F.C.* (D.C., Ct. App., 1949), 177 F. (2d) 654. In those cases, the time limitation of the statute of the *forum* was a substantive part of the *forum's* wrongful death statute. The *lex fori*, therefore, had *no* procedural statute of limitations applicable generally to death actions. Obviously, a substantive part of the *forum's* statute could not be invoked to bar, procedurally, a cause of action based on a different statute. (Here again, note the differ-

ence in *essence*, between a condition on the right, and a statute of limitations.) There was, therefore, in those cases, no statute of limitations at all in the *lex fori* which would bar the actions sued upon. Appellant relies upon these cases in making the brief contention that the California statute of limitations does not purport to apply to any but California death actions. Our statute is *procedural*, not substantive. It applies to *all* actions for wrongful death. It states (C.C.P., 340): "Within one year: * * * an action for injury to or for the death of one caused by the wrongful act * * *". If appellant's argument were correct it would have to apply to foreign actions for personal injuries also, which is manifestly ridiculous.

We say, therefore, that even if there is a rule of law such as stated by appellant, it cannot apply to this case because (1) the Nevada time limitation is a procedural statute of limitations, and not a substantive condition of and limitation on the right itself, and (2) California does not recognize any such rule and has decided that its procedural statutes of limitations apply to bar actions of all kinds.

B. The California statute of limitations applies to this action whether the Nevada time limitation is substantive or procedural.

We believe that the point just discussed adequately answers appellant's contention. However, that discussion was based upon the assumed existence of a rule which actually does not exist. It is only because a few cases have misconceived and misapplied cer-

tain basic principles of conflict of laws that any such argument is possible at all. Except for such cases, it is established by principle and authority that the statute of limitations of the forum is always available as a bar to the remedy, whether the foreign statute contains a substantive or procedural time limitation.

At the outset, the two different fact situations must be kept in mind: (1) Where, under the *lex loci*, the time to sue has expired, but the time has not expired under the statutes of the forum; and (2) where the time to sue has not expired under the *lex loci*, but has expired under the laws of the *lex fori*.

In the first situation, if the time limitation of the foreign statute is *procedural*, the right remains alive and may be prosecuted in any state in which the limitations period has not run. This is true even though suit could no longer be brought in the *lex loci*. *Keyes v. Pullman Co.*, *supra*. If, however, the time limitation is *substantive*, the action may not be brought anywhere, for the expiration of time extinguishes the right as well as the remedy. There are no conflicting cases on this point.

In the second fact situation, if the time limitation is *procedural*, the law of the forum clearly applies.

There is no conflict on this point. The following discussion is concerned solely with the second fact situation, when the *lex loci* time limitation is *substantive*, for it is in this area that some cases have created some confusion.

Actually, there is only one broad consequence of a substantive time limitation. It irrevocably and unqualifiedly limits the time within which suit may be brought *anywhere in the world*, and withdraws all alleviating circumstances, such as waiver, fraud, etc., to which statutes of limitation are subject. That is the specific, express purpose of a statute which conditions the *right* upon bringing suit within a given time. Such a condition, of course, operates substantively, for, by its express terms, it extinguishes the cause of action by lapse of time. The result is that a *cause of action* cannot be stated.

Such a substantive limitation cannot, however, have the effect of repealing or nullifying the *procedural* laws of another state. (See 11 *Am. Jur.*, 310, 311.) Those procedural laws are to be applied in these cases as in all others. The substantive law of the *lex loci* determines whether a cause of action exists. Once that is determined, the *lex loci* becomes unimportant. The question of whether the right may be enforced, procedurally, depends upon the *lex fori*, including its applicable statutes of limitations.

Applying these principles to the case at bar, whether a cause of action *exists* is determined by the *lex loci*. This is a substantive question over which the *lex fori* can have no control. In determining whether such a cause of action exists, a substantive time limitation in the foreign statute is important, since it does operate substantively; if the time has not elapsed, a cause of action can be stated. If the

time has elapsed, the cause of action is extinguished, and suit cannot be brought on it in the forum or anywhere else in the world. Once this question is determined, the application of the substantive law of the foreign state, including the time condition, is at an end.

If the plaintiff can bring herself within the foreign statute, a cause of action is stated, and from that time on, all procedural matters, including the question of whether the forum will entertain this admittedly existing cause of action under its procedural statute of limitations, are governed by the *lex fori*. In other words, the statute of limitations of the forum operates procedurally, in a completely different field. It, unlike the substantive limitation, may be waived if not pleaded as a defense; it may be tolled, there may be an estoppel. All of these matters are procedural, and are matters of the *lex fori* over which the foreign state has no control. These procedural statutes have nothing to do with substantive time conditions on rights. A foreign state could not nullify such procedural laws of the forum even if it tried.

That this is the rule in California is clear from the above quotation from *Engel v. Davenport* (supra, pp. 15, 16). See also, *Hospelhorn v. Van Dusen*, 40 C. A. (2d) 257 (104 P. (2d) 888), and 8 *Cal. Jur.* 1041, 1042.

That it is the only true, logical rule is established by the following authorities:

68 A. L. R. 217;

Hutchings v. Lamson (7 Cir., 1899), 96 Fed. 720;

Hughes v. Lucker (3 Cir., 1949), 174 Fed. (2d) 285;

Restatement, Conflicts of Law, § 397(b);

II *Wharton on Conflict of Laws* (3rd ed., Parmele), 1264, 1266;

3 *Beale, Conflict of Laws*, 1627-1629.

In the annotation referred to, the author states:

“In accordance with the fundamental principle of law that matters pertaining to the remedy are governed by the law of the state or country where suit is brought, rather than that in which the cause of action arose, it is well settled that the statute of limitations of the country, or state, where the action is brought and the remedy is sought to be enforced, controls, in the event of the conflict of laws. In other words, the *lex fori* determines the time within which a cause of action may be enforced. 17 R.C.L. pp. 697 and 698:

“However, where the foreign statute creating a cause of action not known to the common law prescribes a *shorter* period in which action may be commenced than that prescribed by the law of the place where the action is brought, the former, the *lex loci*, governs, and no action can be maintained in any jurisdiction, foreign or domestic, after the expiration of such period, since the limitation is, in such a case, a qualification or condition upon the cause of action itself, imposed by the power creating the right, and not only is action barred, but the cause of action itself is extinguished, upon the expiration of the limitation period. Parmele’s *Wharton, Conf. L.* § 540b.

“It by no means follows, however, that the limitation of the forum would not apply as a bar to the action, where such limitation is shorter than that prescribed by the *lex loci*. As demonstrated by the editor of Parmele’s Wharton, Conflict of Laws, § 540b, the reason why the lapse of time prescribed by the statute creating the cause of action precludes an action thereon in other jurisdictions is that it extinguishes the cause of action itself. The condition prescribed by the *lex loci* is not a statute of limitation at all, properly speaking; so, the application of the *lex loci* in such a case is not really in derogation of the general rule that, where there is a conflict between a statute of limitation of the forum and one of the place where the cause of action arose, the former governs. Where the *lex fori* prescribes a shorter period of limitation, there seems to be no reason for not giving effect thereto, in accordance with the general rule. In such a case, where the period fixed by the *lex loci* has not elapsed, the plaintiff has a concededly existing cause of action; *but it is to existing causes of action, and only to such* that statutes of limitations are intended to apply; and the limitation of the forum does no more in denying relief on a statutory cause of action, than in cutting off the remedy on an equally valid cause of action at common law.” (Emphasis supplied.)

In II *Wharton on the Conflict of Laws* (3rd ed., Parmele), at pages 1264 to 1266, the author states:

“While the bar of the statute by which the cause of action is created thus precludes the maintenance of an action thereon in another jurisdic-

tion, the law of which allows a longer period, the converse is not necessarily true; though some of the cases hold that the statute creating the cause of action governs in this respect, when it prescribes a shorter period than that fixed by the law of the forum. (*Citing Therox v. Northern P. Ry. Co.*, 64 Fed. 84.) This view, however, seems to rest upon a misapprehension. The reason the lapse of the time prescribed by the statute creating the cause of action prevents the maintenance of an action in another jurisdiction is that it extinguishes the cause of action, and there is thenceforth nothing to support an action in any jurisdiction. Assuming, however, that the time allowed by the foreign statute creating the cause of action has not expired, the plaintiff comes to the bar of the forum with a concededly existing cause of action; but it is not apparent why an action thereon does not, as in the case of an existing cause of action at common law, fall within the operation of the general principle that the limitation of actions is governed by the law of the forum. It may be that the same principle which characterizes the limitation prescribed by the foreign statute as a condition affecting the right of action itself, and not merely the remedy, will, when applied to the corresponding statute of the forum creating a similar cause of action, characterize the limitation prescribed by that statute as a matter of right rather than of remedy, and thus confine its operation to causes of action arising at the forum. This is by no means clear, however, since such a limitation appears to affect both the right and the remedy; and if it does affect the remedy it is applicable to foreign causes

of action not barred by the statute of their creation. But, even assuming that the special limitation prescribed at the forum affects the right only, and not the remedy, and is therefore not applicable to foreign causes of action, there may be a general limitation at the forum, which upon the general principle that limitation is governed by the law of the forum is applicable to foreign, as well as domestic, causes of action. If there is no general or special limitation at the forum applicable to foreign causes of action, the action may doubtless be entertained if the bar of the foreign statute has not fallen; but, upon the hypothesis assumed, this result is not due to the fact that the foreign limitation governs, but because it happens that there is no limitation at the forum applicable to the case."

In *Restatement, Conflicts of Law*, sec. 397(b), it is said:

"b. *Statute of limitations at forum.* The limit of time in the death statute of the forum may be interpreted as a statute of limitations for all actions for death irrespective of the place of wrong, as well as a statute limiting the existence of rights created by the statute (see §605); and in that case the suit must be brought within the time limited in that statute, as well as within the time limited in the statute of the place of injury."

In *Hutchings v. Lamson*, *supra*, an action was brought in Illinois to enforce a Kansas statute creating stockholders' liability. The Court said (p. 721):

"The contention of the plaintiff in error that the Kansas statute of limitations alone can have

any application to the case is manifestly not tenable. The general rule is that in respect to the limitations of actions the law of the forum governs, and while the courts will enforce a limitation established under the law of another state, when applicable, it does not do so to the exclusion of the law of the forum. It would involve serious and possibly absurd consequences, if it were established that a right of action created and governed by the law of Kansas could be enforced in Illinois after the time when, by the law of the latter state, the action had been barred. The cases cited show that the law of Kansas, if applicable, will be enforced in Illinois, but they do not say nor imply that a like or different limitation by the statute of Illinois may not apply."

The cases cited by appellant are, for the most part, consistent with, and a part of this correct rule.

In *Davis v. Mills*, 194 U.S. 451, 24 S. Ct. 692, 48 L. ed. 1067, and *Boyd v. Clark* (C.C., Mich., 1881), 8 Fed. 849, the Courts merely held that since the time limitations in the statutes involved were substantive, and that that time had elapsed, necessarily the action (not merely the remedy) was extinguished.

As already pointed out, the cases of *Calvin v. Western Coast Power Co.*, supra, *Lewis v. R.F.C.*, supra, and *Keep v. National Tube Co.* (C.C., N.J., 1907), 154 Fed. 121, involve situations where the time limitation of the law of the *forum* was a substantive part of the *forum's* wrongful death statute,

and could not, therefore, be given procedural application to *other* wrongful death statutes.

The cases of *Maki v. George R. Cooke Co.*, supra, *Wilson v. Massengill* (6 Cir., 1942), 124 F. (2d) 666, supra, and *Theroux v. Northern Pac. Ry. Co.* (8 Cir., 1894), 64 Fed. 84, are, we submit, wrong in principle and logically unsupportable. The *Maki* and *Wilson* cases were decided on the same day by the same Court, which Court so misconceived the subject matter of its decision that it likened the problem to whittling "away with a dull blade upon illogical niceties". The decision in the *Wilson* case contrasts unfavorably with a decision it overturned, *Cauley v. S. E. Massengill Co.* (D.C., Tenn., 1940), 35 F. Supp. 371.

In arguing that the procedural law of the forum applies whether or not Nevada's statute of limitations is substantive or procedural, we have undertaken a burden which we do not really have. We say this because the Nevada statute of limitations is so obviously procedural. We have lengthened this brief by discussing this second point in the hope that the decision of this Honorable Court will clarify the confusion evident in a few of the cases on the point.

C. An action for personal injuries, even though couched in terms of breach of warranty, is barred by the one year statute of limitations.

If the allegations of appellant's complaint are true, she suffered personal injuries as a result of the negligent manufacture or packaging of beer. She could,

therefore, state a cause of action irrespective of any breach of warranty.

Dryden v. Continental Baking Co., 11 Cal. (2d) 33 (77 P. (2d) 833);

Klein v. Duchess Sandwich Co., 14 Cal. (2d) 272 (93 P. (2d) 799).

In any event her action is one for "personal injuries" which is barred if not brought within one year. California Code of Civil Procedure, sec. 340. This section does not say that it relates only to "personal injuries" resulting from torts, but not from breaches of warranty. It relates to *all* actions for personal injuries.

Appellant's argument is ingenious, but it was made, and the answer settled, fifty years ago. The following cases are directly contrary to appellant's contention:

Singley v. Bigelow, 108 Cal. App. 436 (291 Pac. 899);

Escola v. Coca-Cola Bottling Co., 24 Cal. (2d) 453 (150 Pac. (2d) 436);

Automobile Ins. Co. v. Union Oil Co., 85 C. A. (2d) 302 (193 P. (2d) 48);

Harding v. Liberty Hosp. Corp., 177 Cal. 520 (171 Pac. 98);

Basler v. Sacramento Elec. Gas Ry. Co., 166 Cal. 33 (134 Pac. 993);

Huntley v. Zurich Ins. Co., 100 C. A. 201 (280 P. 163);

Rushing v. Pickwick Stage System, 113 C. A. 240 (298 Pac. 150);

Marty v. Somers, 35 C. A. 182 (169 P. 411);

De Mirjian v. Ideal Heating Corp., 91 C. A. (2d) 905 (206 P. (2d) 20).

In *Singley v. Bigelow*, *supra*, the Court said (pp. 438, 444-446):

“The complaint then states that on the twenty-first day of January, 1929, the plaintiff Nettie S. Singley requested one Harold Hopper to go to the drugstore of Justin O. Bigelow and purchase for her a certain amount of epsom salts and quinine, and for the purpose of having said Harold Hopper obtain said articles she wrote the names of the same upon a piece of paper and directed the said Harold Hopper to hand that paper to the person in charge of the drug-store belonging to the said Justin O. Bigelow; that at said time Frank Bigelow, hereinbefore mentioned, was in charge of said store, and gave to the said Harold Hopper the amount of said epsom salts requested, and also gave him a small box of powder labeled Quinine in the handwriting of said Bigelow. It further appears from the complaint that the box labeled ‘Quinine’ in fact contained mercury powder; that the plaintiff Nettie S. Singley took several doses of said powder, under the impression that she was taking quinine; that as a result of taking said mercury powder, said Nettie S. Singley became very ill, suffered a great deal of pain and many ills which we need not mention. * * *

“The cause of action which we are considering is not one *ex contractu*. Paragraph X of the complaint which we have set forth bases the whole right of the plaintiffs to recover, upon the negli-

gence of the deceased. All the injuries therein mentioned are alleged to have arisen from, and flowed out of such negligence. It is purely an action of tort based upon the personal wrong suffered by reason of the action of the deceased, and not upon any breach of contract on his part. *The personal injuries constitute the gravamen of the charge.* Everything else is incidental. The distinction as to what constitutes a cause of action for injury to the person and an injury to property is clearly drawn in the case of *Wikstrom v. Yolo Fliers Club*, 206 Cal. 461 (274 Pac. 959). * * *

“The implied warranty of a druggist as to the quality of the drugs sold does not change the action in the event of negligence. (19 C. J., p. 783.) It is there said: ‘An action against a druggist to recover for personal injuries should be ex delicto, not ex contractu. Every material fact which constitutes the ground of plaintiff’s cause of action must be stated, and where negligence is the basis for the action it must be alleged in plaintiff’s complaint. * * * Where plaintiff charges both common law and statutory negligence and is not required to make an election, he may prove and recover on either.’ * * *

“In *Marty v. Somers*, 35 Cal. App. 182 (169 Pac. 411) the cause of action was pleaded as arising ex delicto. The court said: ‘That even if we should regard it as arising upon contract, nevertheless, the damages sought are directly referable to the personal injuries suffered,’ etc. We think this case applies directly to the case at bar. * * *

“In *Basler v. Sacramento Ry. Co.*, 166 Cal. 33 (134 Pac. 993), where the statute of limitations was involved, depending upon whether the action pleaded was one *ex contractu* or *ex delicto*, the holding of the court was that the gravamen of the charge rested upon the personal injuries inflicted, and was, therefore, *ex delicto*, and that the pleader having set forth a cause of action based upon a personal tort, it could not be upheld as an action *ex contractu*. Without quoting from the *Basler* case, it is sufficient to say that the rule announced in that case is controlling here. The case of *Basler v. Sacramento Ry. Co.*, *supra*, was followed and approved in *Harding v. Liberty Hospital Co.*, 177 Cal. 520 (171 Pac. 98), where a number of cases are cited to the same effect.”

In *Escola v. Coca-Cola Bottling Co.*, *supra*, a manufacturer of a defective bottle was held liable in negligence, and in a concurring opinion Justice Traynor states (p. 466):

“Warranties are not necessarily rights arising under a contract. An action on a warranty ‘was, in its origin, a pure action of tort,’ and only late in the historical development of warranties was an action in *assumpsit* allowed. (Ames, *The History of Assumpsit*, 2 Harv. L. Rev. 1, 8; 4 Williston on Contracts (1936) § 970.) ‘And it is still generally possible where a distinction of procedure is observed between actions of tort and of contract to frame the declaration for breach of warranty in tort.’ (Williston, *loc. cit.*; see Prosser, *Warranty On Merchantable Quality*, 27 Minn. L. Rev. 117, 118.)

“On the basis of the tort character of an action on a warranty, recovery has been allowed for *wrongful death* as it could not be in an action for breach of contract. (Greco v. S. S. Kresge Co., 277 N.Y. 26 (12 N.E. 2d 577, 115 A.L.R. 1020); see Schlick v. New York Dugan Bros., 175 Misc. 182 (22 N.Y. 2d 238); Prosser, op. cit., p. 119.) As the court said in Greco v. S. S. Kresge Co., supra, ‘*Though the action may be brought solely for the breach of the implied warranty, the breach is a wrongful act, a default, and, in its essential nature, a tort.*’ ” (Emphasis supplied.)

In *Automobile Ins. Co. v. Union Oil Co.*, supra, an action for damage to property, the Court held (pp. 303-304, 306-307):

“The first counts allege that on or about April 3 and 28, 1942, defendant sold to Aero Tool Company a product manufactured and prepared by the former for cleaning greasy and oily floors. That at the times of said sales defendant ‘*impliedly warranted * * * that the said products or material was non-inflammable and was fit and safe for said use.*’ That said purchases were made in reliance upon such warranty. It is then alleged that the product was unfit and unsafe for use in cleaning greasy and oily floors in that the same was ‘highly inflammable and consequently dangerous.’ That ‘*as a proximate result of said breach of said implied warranty, a fire occurred at the plant of said Aero Tool Company * * * on or about May 17, 1942, while the floors of said plant were being cleaned with said product or material by the regularly employed janitor of said Aero Tool Company and when said product*

came in contact with a lighted match which was being used by said janitor, who did not know of said inflammable nature of said product or material.'

"The second counts are the same as the first except that an express warranty of noninflammability is alleged rather than an implied warranty.

"The third counts allege the same facts as the first two, but set forth that defendant was guilty of negligence. * * *

"Defendant answered the foregoing complaint, setting up, among other defenses, the bar of section 339, subdivision 1 of the Code of Civil Procedure.

"* * * * *

"The sole question presented on this appeal is whether the complaint and the causes of action therein set forth are barred by the statute of limitations. * * *

"* * * * *

"Respondent urges that upon appellants' own theory of the case it falls within the provisions of section 339, subdivision 1 of the Code of Civil Procedure, which provides a two-year period. That the limitation period within which Aero Tool Company, the insured company, could have maintained an action against respondent is two years for the reason that under appellants' complaint, as to the insured, if any right of action at all is shown, it was only a right of action for breach of contract, which contract is oral and not evidenced by an instrument in writing. That the action is one 'ex contractu.' Appellants, on the

contrary, contend that the right of action on the part of the insured Aero Tool Company, to which appellants' claim is to be subrogated is 'ex delicto,' for the tortious injury to property and is controlled by subdivisions 2 and 3 of section 338 of the Code of Civil Procedure which provide a three-year period within which such an action may be commenced.

"In determining whether an action is on the contract or in tort, we deem it correct to say that it is the nature of the grievance rather than the form of the pleadings that determines the character of the action. If the complaint states a cause of action in tort, and it appears that this is the gravamen of the complaint, the nature of the action is not changed by allegations in regard to the existence of or breach of a contract. In other words, *it is the object of the action*, rather than the theory upon which recovery is sought that is controlling. (Gosling v. Nichols, 59 Cal. App. 2d 442, 444 (139 P. 2d 86); Lowe v. Ozmun, 137 Cal. 257, 259 (70 P. 87); Krebenios v. Lindauer, 175 Cal. 431, 433 (166 P. 17); Nathan v. Locke, 108 Cal. App. 158, 161, 162 (287 P. 550, 291 P. 286); Kings Laboratories v. Yucaipa Valley F. Co., 18 Cal. App. 2d 47, 49 (62 P. 2d 1054)).

"* * * * *

"We are impressed that in the case now engaging our attention, the contract as pleaded had nothing whatever to do with the liability other than to create a duty on the part of respondent herein, and the action is grounded not upon the contract, but upon the duty springing from the relation created by it. While appellants might

have elected to sue either in tort or in contract, it clearly appears to us that the instant action *is based upon the injury done to property*. It, therefore, comes under the provisions of section 338 of the Code of Civil Procedure, which provides that the statutory period for commencing an action for injuring real property and goods and chattels is three years, and that, regardless of the theory upon which relief is sought, viz., whether on a negligence theory or a breach of warranty theory. In the case at bar the pleader was evidently following the commonly accepted practice of setting up the contract of warranty as a matter of inducement to show that a definite legal duty arose on the part of the respondent. *Where, as here, the breach of duty and consequent injury to one of the parties to such contract are set forth, it is the violation of its duty by respondent that is the gravamen of action, which accordingly sounds in tort and is not 'ex contractu'* (Basler v. Sacramento etc. Ry. Co., 166 Cal. 33, 35, 36 (134 P. 993))." (Emphasis supplied.)

It is apparent from these cases that appellant is gravely overstating the fact when she says, on page 26 of her brief, that: "In suits for a breach of warranty, both express and implied, the California Courts have uniformly applied the two-year statute."⁴ The cases cited by appellant do not support the statement, and are not even relevant to the point made.

There is not a single California case applying anything but the one year statute to an action for personal injuries resulting from a breach of warranty.

⁴Appellant's Opening Brief, page 26.

A better argument can be made where the personal injuries result from the breach of an express contract, but even this attempt has been made and rejected. In *Harding v. Liberty Hospital Corp.*, supra. the Court said (pp. 522-523):

“The appellants herein contend that the cause of action set forth in their complaint is one arising out of the breach of the plaintiff Margaret A. Harding’s contract with the defendant, such breach consisting in its failure to furnish adequate and competent surgical treatment for her injured limb, and hence that her cause of action being one for the breach of a written contract, does not come within the scope or effect of subdivision 3 of section 340 of the Code of Civil Procedure. Notwithstanding the elaboration with which the plaintiffs have undertaken to set forth the terms and provisions of their said contract, we are of the opinion that the *gravamen* of this action consists in the alleged negligent acts of the chief surgeon of the defendant, consisting in his unskillful setting of the said plaintiff’s injured limb, by reason solely of which the plaintiff’s alleged injury and damage arose. * * * In that case this court held that the pleading of the contract by the plaintiffs was merely matter of inducement, out of the existence of which the definite legal duty of the defendant arose; and in that case, as in the instant one, the breach of that definite legal duty consisted in the alleged negligent acts and omissions of the agent of the defendant and consequent injury directly and solely caused thereby. The court there held that this was the gravamen of the action, citing numerous authorities in support of its view. In the later

case of *Krebenios v. Lindauer*, 175 Cal. 431 (166 Pac. 17), the same question arose and was similarly decided. There the injury complained of was the alleged negligence of the defendant in failing to provide the plaintiff with a safe place to work, in violation of its contract of employment, and the court there held the action to be one arising *ex delicto* and to be barred by the provision of the section and subdivision of the code above quoted. * * * Notwithstanding the conflict of authority from other jurisdictions, we are satisfied that it has become the settled rule in California that actions for injuries caused by the negligent acts of another or his agent must be commenced within the period of one year from the date of the alleged injury, and that the fact that the parties stand in contractual relation to each other does not operate to change the rule or extend the time for the commencement of such actions."

The leading case on the point is *Basler v. Sacramento Electric Gas Ry. Co.*, *supra*, where suit was sought to be based upon a contract of safe carriage, and the Court said (pp. 36-37):

"It has been held that the word 'for' means 'by reason of,' 'because of' and 'on account of' and that a statute prescribing a limitation on 'actions for injury to the person * * * caused by negligence' should be interpreted to mean 'actions "by reason of" or "because of" or "on account of" injuries to the person caused by negligence.' (*Sharkey v. Skilton*, 83 Conn. 503 (77 Atl. 950).) Applying this rule to our own statute *we must hold that the language of section 340 quoted above*

refers to actions for damages 'on account of' personal injuries. In *Sharkey v. Skilton*, the plaintiff was the husband of the injured woman and there, as here, counsel sought to make a distinction between the direct injury to the wife and the indirect damage and loss to the husband, but the court held that both harmful results had their efficient cause in the accident to her and that therefore the same statute of limitations applied to actions in which the wife was a party and to those in which the husband sued alone because of his relative rights.

“We see no escape from the reasoning of the foregoing authorities. The demurrer was properly sustained for the reason that the cause of action was pleaded as one arising *ex delicto*, but even if we should regard it as arising upon contract, nevertheless *the damages sought are directly referable to the personal injuries suffered by Mrs. Basler and consequently the time for the commencement of the action is limited by the terms of subdivision 3 of section 340 of the Code of Civil Procedure.*” (Emphasis supplied.)

We say, therefore, that appellant's action for personal injuries is clearly barred by the statute of limitations, and was properly dismissed.

CONCLUSION.

With respect to the action for wrongful death, appellant's case concededly depends upon a judicial determination that one provision of the Nevada statute

of limitations is not a part of the statute of limitations at all; but instead is an inherent, inseparable part of, and an express condition of and limitation upon, the wrongful death statute which is separated from it by sixty chapters, and which does not itself mention any time limitation. Appellant's argument is not reasonable. Further, the consequences of imposing such an absolute time limitation upon this statutory right are such that it should not lightly be done in the absence of a clear, legislative intent.

The Nevada statute of limitations could not more clearly be an ordinary, procedural limitation.

Apart from this, however, California law governs this case, and it is clear from the cases of *Gregory v. Southern Pacific Co.*, supra, and *Engel v. Davenport*, supra, that appellant could not avoid the bar of the one-year statute in the California Courts. In this connection, the *Engel* case states the only logical, proper rule, which is that even if the time limitation of the foreign statute is substantive, the only question that it affects is whether a cause of action can be stated; if it can, the next question is whether, procedurally, the California statute permits its enforcement. This question, together with matters of waiver of the statute, etc., are procedural things exclusively governed by the *lex fori*, in this case, the law of California.

Appellant's argument to sustain her action for personal injuries has been made to and refuted by the California Courts on numerous occasions.

Appellee respectfully submits that the District Court properly dismissed appellant's complaint, and that its order should be affirmed.

Dated, San Francisco, California,
May 12, 1950.

Respectfully submitted,
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